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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 530

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

v.

C. PROSSER, Intendant, ODELL VENTERS, EDWARD A. EADDY, R. B. HUGGINS, JR., J. ELMER TAYLOR, Wardens of the Town of Johnsonville,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	6
Conclusion	11
Appendix:	
Relevant Sections of the Code of Laws of South Carolina, 1942	12

CASES CITED.

	PAGE
Adamson v. *Calif.*, 332 U. S. 46, 80	6
Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226	6, 7, 8
Chicago B. & Q. R. Co. v. *Public Utilities Commission*, 69 Colo. 274, 193 P. 726	7
Chicago, M. & St. P. R. Co. v. *Minneapolis*, 232 U. S. 430	8
Cincinnati, I. & W. R. Co. v. *Connersville*, 218 U. S. 336	8
Coe v. *Armour Fertilizer Works*, 237 U. S. 413	9
Davidson v. *New Orleans*, 96 U. S. 97	6
Georgia Power Co. v. *Decatur*, 281 U. S. 585	7
Hulan v. *Corsicana* (C. C. A. 5th), 65 F. 2d 969, certiorari denied 290 U. S. 662	9
McCoy v. *Union Elev. R. Co.*, 247 U. S. 354	7
Northern P. R. Co. v. *Department of Public Works*, 268 U. S. 39	9
Panhandle Eastern Pipe Line Co. v. *State Highway Com.*, 294 U. S. 613	7
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393	7, 9, 10
Seaboard Air Line Railroad Company v. *Daniel*, 333 U. S. 118, at page 124	11
Southern Kansas R. Co. v. *Oklahoma City*, 12 Okla. 82, 69 P. 1050	6
Southern R. Co. v. *Virginia*, 290 U. S. 190	6, 7, 9
Turner v. *Wade*, 254 U. S. 64	9
United States v. *Welch*, 217 U. S. 333	6
Washington ex rel. Oregon R. & Nav. Co. v. *Fairchild*, 224 U. S. 510	6
Wuchter v. *Pizzutti*, 276 U. S. 13	9

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

Seaboard Air Line Railroad Company (hereinafter called the Petitioner or the Seaboard) prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above-entitled case on October 11, 1949, and that this Court review and reverse the judgment and decision of that court.

Opinions Below.

The opinion of the Court of Common Pleas of Florence County (R. 126) is not officially reported. The opinion of the Supreme Court of South Carolina (R. 145) is not yet officially reported.

Jurisdiction.

The judgment of the Supreme Court of South Carolina was entered on October 11, 1949 (R. 145). The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

Question Presented.

The Supreme Court of South Carolina stated in its opinion that it had not theretofore had occasion to pass directly upon the question here presented (R. 148). Its decision, which it is respectfully submitted is erroneous, is of great importance to the Seaboard and the other railroads owning and operating lines of railroad in South Carolina.

Seaboard acquired its right of way through what is now the Town of Johnsonville, South Carolina, prior to the incorporation of that town on May 24, 1913 (R. 117). The town had a population of 464 according to the 1940 census and an estimated population of 600 to 700 in 1948 (R. 22-23).

The railroad runs almost due north and south through the town and it is part of the Seaboard's main north and south freight line from Florida to eastern and northern points (R. 76-77). During the short and light month of February 1947, 379 trains passed through the town, and during the heavier month of November 1947, 407 trains went through the town (R. 75).

There are two open streets within the town limits that cross the railroad, the principal one being Broadway, 80 feet in width, with a 50-foot paving (R. 90) which is protected by automatic flashing lights and bells that have been in operation more than five years (R. 71). This proceeding arose as a result of the efforts of the respondents to open a new grade crossing over the right of way and tracks of

the railroad at a point 316 feet south of Broadway and immediately adjacent the Seaboard's station building (R. 27), at a point where no street existed or had been opened in law or in fact, by a mere order of a county board of commissioners and without compensation to the Petitioner.

The sole question presented is clearly stated in the following two paragraphs of the opinion of the Supreme Court of South Carolina (R. 148-149):

> "It is also contended that establishment of the crossing in question would unlawfully deprive appellant of its property without compensation and without due process in violation of Article I, Section 17 of the Constitution of South Carolina and the Fourteenth Amendment of the Constitution of the United States. *This Court has not heretofore had occasion to pass directly upon this question.* Appellants contend and cite authorities for their position that a city has a right to open a street when the public interest demands it and has the right to close a dangerous street when the public interest demands, but it can do neither without paying for the property taken, destroyed or seriously damaged. None of these authorities, however, are in point if such crossing may be established under police powers.
>
> "This Court in the case of Thomas *vs.* A. C. L. Railroad Company, 168 S. C. 185, 167 S. E. 239, sustained an order of the Board of County Commissioners for Williamsburg County establishing a crossing within the limits of the Town of Kingstree over the right of way of the Railroad Company. The proceedings in that case were the same as in instant case, being brought under Section 8434 of the South Carolina Code, 1942, and the case is very much in point except that the Railroad Company on appeal to the Supreme Court did not raise the question that the taking was in violation of Article I, Section 17 of the Constitution of South Carolina and the Four-

teenth Amendment of the Constitution of the United States. *The Thomas case is further differentiated from the case at bar in that there the street was in existence prior to the construction of the railroad, while here the railroad was in existence prior to the opening of the street or town way.*" (Emphasis supplied.)

The Supreme Court of South Carolina decided that question against the Petitioner (R. 151). This Court may take judicial notice of the fact that Seaboard and the other railroads in South Carolina own and operate several thousand miles of railroad in that state, in many counties and incorporated towns. If the local authorities in South Carolina may take the property of the railroads in that state without compensation, under the guise of the police power, as was done in this case, a serious problem is presented, which will increase in seriousness with the growth in population of the state, and may present intolerable burdens in the larger cities and towns.

Statutes Involved.

The relevant sections of the Code of Laws of South Carolina, 1942, are set forth in the Appendix, *infra,* pages 12-13.

Statement.

On November 6, 1947, the respondents, constituting the town council of Johnsonville, initiated this action by filing its petition with the Florence County Governing Board for an order requiring the Seaboard to construct the Marion Street crossing. The petition was predicated upon Section 8434 of the South Carolina Code (Appendix, *infra,* page 13).

In its answer the Seaboard interposed several defenses, among them the federal question which this petition seeks to have reviewed, that the establishment of the crossing would constitute a taking of the Seaboard's property without compensation in contravention of the 14th Amendment. The matter came on for hearing before the Governing Board on March 5, 1948, and the Governing Board's order, dated May 1948, found that the convenience of the citizens of the town required the crossing, ordered Marion Street laid out across the right of way and tracks of the railroad, and directed the railroad to construct and maintain the crossing. No compensation was provided for by the order; none was intended to be made. Nor did the Governing Board undertake to discuss or pass upon any of the constitutional objections raised in the answer to the petition. On appeal to the Court of Common Pleas of Florence County specific exception was taken to the Governing Board's order on the ground that it violated the due process requirement of the 14th Amendment, but the judge of that court dismissed all exceptions and affirmed the order below.

On further appeal, in which the federal question was again reasserted, the Supreme Court of the State of South Carolina rejected all exceptions and, in turn, affirmed the judgment of the Court of Common Pleas. In overruling the constitutional objection, the Supreme Court of South Carolina did not stop to inquire whether the Seaboard was entitled to compensation for its property actually taken, and merely declared "that a state has power under its police powers to require a railroad company to construct and maintain at its own expense suitable crossings over the right of way of railroad companies even though the street be laid out subsequent to the construction of the railroad" (R. 149). Both the Supreme Court of South Carolina and

the lower state court relied upon *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, in resolving this exception against the Seaboard.

Reasons for Granting the Writ.

(1) We submit that the holding of the South Carolina court on the federal question involved is erroneous and wholly inconsistent with the decisions of this Court, particularly with *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, cited and relied upon by the South Carolina court to substantiate its holding. Clearly, the crucial point decided by that case was overlooked or disregarded by the South Carolina court. Noteworthy because it was apparently the first decision of this Court which brought in a Bill of Rights provision under the due process clause that case, in effect, overruled *Davidson* v. *New Orleans*, 96 U. S. 97, "by holding, under the new due process-natural law formula, that the 14th Amendment forbade a state from taking private property for public use without payment of just compensation."[1]

There can be no doubt that, if carried into effect, the challenged order of the Florence County Governing Board would result in taking private property for public use. *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *Southern R. Co.* v. *Virginia*, 290 U. S. 190. A right of way is an easement and is land. *United States* v. *Welch*, 217 U. S. 333. In addition to the easement, deprivation of the use of a portion of the switch track and the removal of the depot (R. 77, 102) also constitute a compensable taking. *Southern Kansas R. Co.* v. *Oklahoma City*, 12 Okla. 82, 69 P. 1050. Since no compensation was pro-

[1] Cf. dissenting opinion of Mr. Justice Black in *Adamson* v. *Calif.*, 332 U. S. 46, 80.

vided for, or intended, by the Governing Board's order, such taking is inhibited by the 14th Amendment. *Panhandle Eastern Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613; *Chicago B. & Q. R. Co.* v. *Chicago, supra* (166 U. S. 226); *McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354; *Chicago B. & Q. R. Co.* v. *Public Utilities Commission*, 69 Colo. 274, 193 P. 726.

(2) Contrary to the opinion of the South Carolina court, the order of the Governing Board cannot be upheld as a valid exercise of the police power. A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. *Panhandle Eastern Pipe Line Co.* v. *State Highway Com., supra* (294 U. S. 613); *Georgia Power Co.* v. *Decatur*, 281 U. S. 585; *Southern R. Co.* v. *Virginia, supra* (290 U. S. 190).

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, this Court refused to sustain a Pennsylvania statute as an exercise of the police power which forbade the mining of anthracite coal under streets in such a way as to cause the subsidence of any structure used as a human habitation. While the facts are not analogous to those in the instant case, the following excerpt from the opinion of Mr. Justice Holmes is precisely relevant here:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. * * * *We are in danger of forgetting that a strong public desire to*

improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Emphasis supplied.)

It is recognized that, notwithstanding a railroad must be compensated for the laying out of a street across its right of way, the decisions of this Court conclude reimbursement of the expense of constructing and maintaining the crossing itself. This is the subordinate, not the principal, issue decided in *Chicago B. & Q. R. Co.* v. *Chicago, supra* (166 U. S. 226), under which the South Carolina court seeks to justify the order of the Florence County Governing Board. It is not without significance that that case was a condemnation proceeding in which the city was condemning certain parts of the railroad's right of way for the opening and widening of a street across it. Only nominal compensation was awarded by the Illinois courts and it was contended, among other things, that the company was deprived of its property without due process of law because, in ascertaining the compensation, the cost of constructing gates and a tower for operating them, planking the crossing, filling between the rails, putting in an extra rail, and the annual expense of depreciation, maintenance, etc. were disregarded. This Court held that since the company took its charter and laid its tracks subject to the condition that their use might be regulated by the state so as to insure the public safety, the exercise of that authority by the state was not subject to a condition that the company should be indemnified for the damage resulting from its exercise. To similar effect are *Cincinnati, I. & W. R. Co.* v. *Connersville,* 218 U. S. 336, and *Chicago, M. & St. P. R. Co.* v. *Minneapolis,* 232 U. S. 430, cited by the South Carolina court, both of which were condemnation proceedings. But in none of those cases is there, as there could not be, a suggestion that

the condemnor could escape the payment of compensation for what was actually taken, which is precisely where the South Carolina court has deviated from the decisions of this Court. A proper exercise of the police power may, in some cases, permit a state to require a railroad at its expense to construct and maintain grade crossings, but it is a highly improper and unlawful extension of that power to require a railroad to give up its property for the creation of such crossings without compensation.

(3) If, as authoritatively construed by the South Carolina court, Section 8434 of the South Carolina Code (Appendix, *infra*, page 13) authorizes the taking of railroad property for a public use without compensation, it does not afford the owners of such property due process of law and that statute is, therefore, unconstitutional. Cf. *Turner* v. *Wade*, 254 U. S. 64; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Northern P. R. Co.* v. *Department of Public Works*, 268 U. S. 39; *Southern R. Co.* v. *Virginia*, *supra* (290 U. S. 190); *Pennsylvania Coal Company* v. *Mahon*, *supra* (260 U. S. 393); *Hulan* v. *Corsicana* (C. C. A. 5th), 65 F. 2d 969, certiorari denied 290 U. S. 662.

The Seaboard took the position below, which it still regards as sound, that the only authority conferred on the Governing Board by Section 8434 is that of laying out, or authorizing a city or town to lay out, a way across a railroad; that it does not purport to dedicate, donate or in any other way transfer to the city or town which it authorizes to lay out a way, property to be occupied by such town way, or even an easement over such property. It was further contended that the state legislature could not be presumed to have intended to confer upon county boards such an extraordinary power as that of commandeering or

confiscating a railroad's property without compensation, particularly in view of other provisions made in the state statutes for an orderly and legal method of acquisition of property for street purposes. Sections 7367 and 7368 of the South Carolina Code (Appendix, *infra*, page 12) provide, in effect, that the appropriate city or town officials shall, when they deem it expedient to lay out a street, have power to purchase the necessary land, and, failing to purchase it at a reasonable price, shall proceed to condemn the same. It was urged upon the South Carolina court that the last-named statutory provisions be considered in conjunction with Section 8434, that they qualify and at the same time implement the authority contained in that section, and that the respondents, having been authorized to lay out Marion Street across the railroad's right of way, must next proceed to acquire the property needed by purchase or condemnation.

The South Carolina court, in repudiating this contention, necessarily placed the construction upon Section 8434 that it authorizes the taking of railroad property for a public use without compensation. So construed, the statute denies due process and is unconstitutional.

(4) Authoritative decision by this Court of the question presented by this petition is of importance, and the importance of the question cannot be measured by the amount of compensation which the Seaboard should be entitled to in this instance.

Once the invasion of a constitutional right is permitted to go unchecked, the door is open to further and bolder encroachments so that what was once a valuable right becomes, by a whittling-down process, worthless and non-existent. Cf. *Pennsylvania Coal Company* v. *Mahon, supra* (260 U. S. 393). Today the public may desire only an ease-

ment over a piece of railroad property for street purposes. Tomorrow it may want a portion of the right of way itself, or perhaps some station property, or even a railroad yard. There may exist good cause for the public's wants and justification for satisfying them but, at the same time, there is no unrestricted authority to accomplish whatever the public may presently desire. The chief restriction, and the one invoked in this case, is that where there is a taking there must be an exercise of eminent domain and compensation to sustain the act.

In *Seaboard Air Line Railroad Company* v. *Daniel,* 333 U. S. 118, at page 124, this Court took note that Congress has long made a matter of primary national concern the maintenance and development of an economic and efficient railroad system. We think there can be no doubt that the unchallenged extension of the police power to permit the taking of railroad property without compensation in the manner sanctioned by the South Carolina court, in this case, will directly and adversely affect the maintenance and development of an economically sound railroad system.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. MCDONOUGH, JR.,
Attorney for Petitioner.

ROBERT E. NORTHUP,
Of Counsel.

January 6, 1950.

Appendix.

Relevant Sections of the Code of Laws of South Carolina, 1942.

§7367. *May purchase land for streets.*—Whenever the mayor and aldermen of any city or the intendant and wardens of any town in this State shall think it expedient to widen, open, lay out, extend or establish any street, alley, road, court or lane, they shall have power to purchase the lot, lots or parts of lots of land necessary for such street, alley, lane, road or court, and the fee simple of said land shall be vested in said city or town for the use of the public from the day of the deed of sale.

§7368. *Proceedings on refusal of owner to sell—appeal by owner.*—In case any owner or owners of said lot or lots of land as aforesaid shall refuse to sell the same, or shall demand what may be deemed by the said authorities an unreasonable price, then the said authorities shall notify such owners that the land is required for street purposes and that application will be made to the clerk of court of common pleas for the drawing of a jury in condemnation to determine and fix upon the true and real value of such land, and any damage thereto, by reason of the opening, widening or extension of such highway; due regard being had, in assessing such damages, to any increased value of such lot, lots or parts of lots, by reason of the opening, widening or extension of such highway. And on the payment of the full value of said lot or lots, and such special damages aforesaid, ascertained and determined on in the manner above provided, the fee simple of said lot, lots or parts of lots, shall be vested in such city or town for the use of the public, and the said owner shall execute his deed, without warrranty therefor, accordingly to said city or town. In case any owner shall be dissatisfied with the valuation of his lot or lots, or such special damages aforesaid, it shall and may be lawful for either party to appeal from the same upon giving notice of such appeal to the mayor and aldermen, or

intendant and wardens, of such city or town, within ten days from the time of his receiving a notification of such valuation and assessment of damages, to the court of common pleas for the county in which said lands may be at the next session thereafter: and the said court shall order a new valuation and assessment of damages, or either, in such particular case, to be made by a jury, who shall be charged therewith in the same or some subsequent term, and their verdict shall be final and conclusive unless a new trial be granted, and after judgment in such case the fee simple of said lot or lots, or parts of lots, shall be vested in such city or town, upon the payment, or tender of payment, of the amount of such valuation and damages, and the said owner shall thereupon execute his quitclaim deed therefor accordingly to said city or town. After tender of the amount found by the commissioners for compensation and damages, the pending of an appeal either in the circuit or the Supreme Court shall not operate to stay the opening, widening or extension of said street; but the acceptance of the amount tendered shall operate as an abandonment of the appeal.

§8434. *Highway or town way across railroad—how may be laid out.*—A highway or town way may be laid out across a railroad previously constructed when the county board of commissioners adjudge that the public convenience and necessity require the same; and in such case, after due notice to the railroad corporation, and hearing all parties interested, they may thus lay out a highway across a railroad, or may authorize a city or town, on the petition of the mayor and aldermen thereof, to lay out a way across a railroad in such manner as not to injure or obstruct the railroad.